

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DEREK FUNDARO,

Defendant-Appellant.

UNPUBLISHED

January 26, 2012

No. 301194

Oakland Circuit Court

LC No. 2009-229799-FC

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Defendant Christopher Derek Fundaro appeals by right his jury conviction of felony-murder. See MCL 750.316(1)(b). The trial court sentenced Fundaro to serve life in prison without the possibility of parole. On appeal, the only issue is whether the trial court erred when it determined that Fundaro voluntarily made a statement to officers after waiving his constitutional rights and, for that reason, denied his motion to suppress his statements. We conclude that the trial court did not err when it denied Fundaro's motion to suppress the statements. Accordingly, we affirm.

I. BASIC FACTS

The prosecution charged Fundaro with felony-murder arising from the stabbing death of John Cox at his store, Three Doors Down, in Pontiac, Michigan. Cox's wife testified that Three Doors Down was a small boutique located in a strip mall. Cox mostly catered to young adults; he sold T-shirts, jewelry, handbags, tie-dye, and posters. She stated that Cox usually started the day with \$150 in the register.

Geno Clemmons testified that he knew Fundaro and that for a time he let Fundaro stay at his home. However, the living arrangements did not work out and he told Fundaro to leave in October 2009. Clemmons admitted that he had used drugs in the past and that he had a criminal record.

Clemmons stated that on October 22, 2009, his girlfriend drove him to the gas station near the strip mall where Three Doors Down was located; they went there for gas and cigarettes. He said that, as he got out, he noticed Fundaro “in front of the gas station kind of pacing.” Fundaro “approached me and said he had a lick to hit”¹ Clemmons understood that Fundaro was asking him to participate in the robbery, but he refused and they went their separate ways. Clemmons said it was between 2:30 and 3:30 in the afternoon.

Hikmat Jajo testified that he was working at the dollar store located a few doors from Cox’s store when, at around 5:30 pm., a man came into his store and told him to call the police, but did not explain why. He followed the man after he left his store and saw him standing in front of Three Doors Down. Jajo said he went down to Three Doors Down and looked into the store; he saw a man lying face down with “his shirt up and most of his stuff on the floor.” He returned to his store and called the police. The police arrived in just a few minutes.

Raymond Wiggins testified that he was a patrol officer and that he went to Three Doors Down after receiving a “man down” call at 5:30 pm. When he arrived, he saw a man lying face down in a pool of blood with a hammer under his left arm. He said the man did not appear to be breathing and “was already turning [bluish], purplish in the face.” The store’s items had also been tossed about as if there had been a struggle. Other testimony established that the store’s cash register was found on the floor, broken, and with no paper currency in it.

An expert pathologist testified that Cox had been stabbed nine times, which included five stabs to his back. One of the stabs to Cox’s back penetrated his thoracic cavity and went into his lung; this stab wound was fatal.

Brian McLaughlin testified that he was a patrol sergeant and that he responded to Three Doors Down. He received information that there were two possible suspects: one dressed in blue and the other in gray and balding. McLaughlin sent an officer, Craig Pesko, into a nearby high-crime neighborhood to canvass for the suspects.

Pesko testified that he had driven into the nearby neighborhood when one of his dogs began to bark. He looked and saw a man wearing a gray hooded sweatshirt walking between a fence and a garage. The man appeared to be bald. Pesko got out of his car and went to the fence line; the man was gone, but he saw a nearby apartment building and observed the man on the other side of a fence surrounding the apartment. Pesko followed the line of the man’s path, but lost sight of him. Pesko then searched a nearby open parking lot and discovered the man, later identified as Fundaro, hiding under a trailer. He took Fundaro into custody and turned him over to McLaughlin. Pesko said that the parking lot was around two blocks from Three Doors Down.

McLaughlin said that he drove to Pesko’s location after Pesko radioed that he had taken a suspect into custody. McLaughlin patted Fundaro down and found \$171 in cash in his front pocket: four twenties, seven tens, one five and sixteen ones. He said that the cash was in order and folded; he also said that Fundaro did not have any cash in his wallet. McLaughlin also found

¹ Clemmons explained that to hit a lick means “to rob or steal.”

two cell phones. When he opened one of the cell phones, a “Three Doors” banner appeared on the screen.

Cox’s wife testified that Cox was supposed to pick up their fifteen-year-old daughter from school at 7:30 that night. When her husband and her daughter had not arrived home by 8:15 pm., she became worried and called her daughter. Her daughter told her that “Dad hasn’t picked me up yet.” So Cox’s wife called his cell phone and a detective answered. Although reluctant to speak over the phone, the detective eventually admitted that her husband was dead.

Detective Sergeant Steven Troy testified that he and detective Steven Wittebort interrogated Fundaro after he was brought into custody. Fundaro admitted that he spoke with Clemmons at the gas station, but denied that he had anything to do with Cox’s death. Fundaro told him that a woman paid him some cash that she owed him earlier that day and that he had found Cox’s cell phone.

Troy said that, because Fundaro was not responding well to their questioning, they decided to bring in an officer from the auto-theft unit, Peter Mistretta. Mistretta was investigating an auto theft with which Fundaro might have been involved. He explained that he thought Fundaro might respond better to Mistretta because he had worked undercover and “has a different look”: he has “long hair” and wears a “goatee.” He said that Mistretta was also a very good interviewer. After Mistretta arrived, Troy watched the interview on video from another room.

Mistretta testified that Troy called him and that he came over to interview Fundaro about the auto theft. After Fundaro admitted that he stole the car, the conversation turned to Cox’s death. Mistretta said that Fundaro eventually admitted that he killed Cox:

His intent was to go in and rob him. He was inside the store for about ten minutes just looking around. There was small talk between him and [Cox].

And then he stated that [Cox] came at [him] with [a] claw [hammer] and [Cox] just went crazy—pretty much is what he said—and came at him swinging at him with a hammer and trying to [hit] him with the hammer.

And [they] wrestled and knocked stuff down in the small area which apparently is real small according to him. There was just a counter top in this real small store and that was a mess.

And that he just kept—he stabbed him, is what he told me.

The prosecution also moved for the admission of the video of Fundaro’s interview and the trial court had it played for the jury.

In closing, Fundaro’s lawyer did not contest that Fundaro killed Cox; rather, he argued that the evidence showed that Fundaro only killed Cox after Cox attacked him. On that basis, he argued that the jury should find Fundaro guilty of voluntary manslaughter, not felony-murder. The jury rejected this argument and found Fundaro guilty of felony-murder.

II. MOTION TO SUPPRESS

A. STANDARDS OF REVIEW

On appeal, Fundaro argues that the trial court erred when it denied his motion to suppress his custodial statement because his statement was not made voluntarily. He maintains that the officers coerced his confession through misconduct—namely, through lies and improper legal advice. This Court reviews de novo the entire record to determine whether a defendant made a voluntary, knowing and intelligent waiver of his constitutional rights. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). However, this Court reviews for clear error the factual findings underlying a trial court’s decision to deny a motion to suppress. *Id.*

B. ANALYSIS

Before Fundaro’s statement could be admitted against him, the prosecutor had to demonstrate that Fundaro voluntarily made the statement. *People v Cheatham*, 453 Mich 1, 13; 551 NW2d 355 (1996). In addition, because Fundaro was in custody at the time he made the statement, the prosecutor had to show that Fundaro was advised of his constitutional rights—consistent with *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)—and that he voluntarily, knowingly, and intelligently waived those rights. *Cheatham*, 453 Mich at 13. A statement is voluntarily made if it was the product of a “free and deliberate choice rather than intimidation, coercion, or deception.” *Id.* at 635, quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986) (internal quotation marks and citation omitted). The prosecutor must establish that the statement was voluntary by a preponderance of the evidence. *Daoud*, 462 Mich at 634-635.

On appeal, Fundaro does not contest that he was advised of his constitutional rights and that he waived those rights. Rather, he argues that his ultimate decision to admit to stabbing Cox was not voluntary. Specifically, he claims that he only made the statement after the officers deliberately lied to him about the evidence that they had collected and improperly convinced him that he had a viable legal defense: self-defense or accident.

The test of voluntariness does not depend on any one factor; rather it must be determined on the totality of the circumstances under which the accused made the statement. See *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). A statement is not voluntary where the defendant’s will has been overborne and his or her capacity for self-determination critically impaired. *Id.* at 334. “The line of demarcation ‘is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.’” *Id.*, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). In considering the voluntariness of the statement, courts should consider the following factors:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a

magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id.* at 334.]

At the suppression hearing, Wittebort testified that he interviewed Fundaro along with Troy. Wittebort stated that, before beginning the interview, he asked Fundaro some preliminary questions: he determined that Fundaro was 19 and could read, write and understand English. Fundaro appeared to understand him and to be coherent. Wittebort also advised Fundaro of his rights and made it clear that “at any time during my questioning if you choose to use your right to remain silent or your right to an attorney, you can stop talking to me. I don’t take it personal. That’s your right.” Fundaro told him that he understood his rights and waived them. The interview lasted about three hours.

Fundaro admitted at the hearing that he understood his rights and waived them. And, although he testified that he had taken heroin the previous day and was still feeling the effects at the time of his arrest, he admitted that he did not tell the officers that he was under the influence during the interview and agreed on cross-examination that he was not intoxicated or under the influence of controlled substances. He admitted that he had not been threatened during the interview, but he claimed that Wittebort threatened to sodomize him during booking if he did not talk.² Despite this alleged threat, Fundaro not only did not admit to the crime for almost the first two hours of the interview, he actually provided the officers with explanations for his possession of the cash and phone discovered in his pockets after his arrest. He also admitted that he repeatedly lied to Wittebort and Troy during the interview and that he did so because he did not want to get in trouble. It is, therefore, apparent that Fundaro did not feel compelled to reveal any details to Wittebort or Troy despite all their efforts to persuade him to talk and despite the alleged threat; he did not reveal anything until after Mistretta substituted in at the interview. Accordingly, it cannot be said that physical ailments or threats so affected Fundaro that his will was overborne or his capacity for self-determination was critically impaired. *Cipriano*, 431 Mich at 334.

Further, although the officers admitted that they told Fundaro that they had evidence and witnesses that they did not actually have, Fundaro did not confess after the officers made those representations. Fundaro testified at the hearing that he only decided to confess after the officers convinced him that what he did was not wrong:

Well, 'cause after they had been in there for a while and talking to me, it was really mostly Sergeant Troy, and then once, and Mistretta came in, they just kept—I kind of felt like what I did was not that, all that wrong. They kept telling me I didn't do nothing wrong, really, basically is how I felt.

² Wittebort denied that he ever threatened Fundaro.

Fundaro explained that the officers kept telling him that it sounded like it was an accident or self-defense and that it would be better for him if he would just tell them what happened. He stated that he would never have admitted to committing the crime had he known that he would be facing life in prison. Thus, even if the officers' misrepresentations about the evidence could be said to be improper, see *Frazier v Cupp*, 394 US 731; 89 S Ct 1420; 22 L Ed 2d 684 (1969), according to Fundaro's own testimony those misrepresentations were not the motivating impulse behind his decision to tell the officers what happened at Three Doors Down. See *People v Givans*, 227 Mich App 113, 123; 575 NW2d 84 (1997) (stating that the use of misinformation to deceive a defendant is but one factor "to be weighed with all other aspects of the interrogation . . ."). Rather, it was his belief that he had not done anything "wrong" when he stabbed Cox to death—a belief that the officers allegedly improperly induced.

At the hearing, Wittebort testified that he and Troy tried to get Fundaro to tell them about the stabbing by throwing out "theories" or "scenarios" that might help Fundaro rationalize what happened:

It's just another, it's another theory. . . . I mean, the bottom line is we're trying to get to the bottom of what happened. So, throw a bunch of scenarios . . . and see which . . . appeals to him. So, I mean, it's just another rationalization that was tossed at Mr. Fundaro.

Although they suggested theories and scenarios under which Fundaro might not be guilty of murder, Wittebort testified that he never promised Fundaro leniency and that he did not hear anyone else promise him leniency. And Fundaro testified that the officers talked about leniency, but did not specifically promise him anything. Indeed, he acknowledged that Troy told him that he could not promise him anything. Fundaro suggests that he only confessed because the officers convinced him that he would not be charged with murder, but the officers used these types of themes from the very beginning of the interview and Fundaro had no trouble denying involvement throughout the majority of the questioning. Moreover, during the interview, and despite all the allegedly misleading statements, Fundaro repeatedly indicated that he understood that he would likely go to prison; he even told Mistretta: "I killed a guy and I went in there to rob the joint. I'm still going to go to prison?"

On this record it is clear that Fundaro understood the seriousness of the offense that he committed and did not understand the officers' proffered rationalizations as a promise of leniency in exchange for his confession. See, e.g., *People v Conte*, 421 Mich 704, 739-741; 365 NW2d 648 (1984) (opinion by Williams, C.J.) (noting that there must be a promise of leniency and the promise must induce the confession). Although the officers might have helped him rationalize his actions in such a way that he might hope that he would not be charged with murder, the evidence does not demonstrate that these tactics so affected Fundaro that his will was overborne or his capacity for self-determination was critically impaired. *Cipriano*, 431 Mich at 334.

The trial court did not err when it determined, under a totality of the circumstances, that Fundaro's statement to the officers was voluntary. Therefore, it did not err when it denied his motion to suppress his statement.

Affirmed.

/s/ David H. Sawyer

/s/ William C. Whitbeck

/s/ Michael J. Kelly